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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1965

HANK AVERY, PETITIONER

v.

MIDLAND COUNTY, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 958

HANK AVERY, PETITIONER

v.

MIDLAND COUNTY, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The petition for a writ of certiorari in this case seeks review of a judgment of the Texas Supreme Court (406 S.W. 2d 422) upholding the districting scheme pursuant to which members of the county governing board of Midland County, Texas, are elected. Under this scheme three of the four Midland County commissioners are elected by only five percent of the county's population, while the other 95 percent elect only one commissioner. Reviewing a challenge invoking the Equal Protection Clause of the Fourteenth Amendment, the Texas Supreme Court concluded that the principles stated by this Court in *Reynolds* v. *Sims*, 377 U.S. 533, and related cases are not applicable to county governing boards and do not

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require redistricting of Midland County on a population basis. The petition for certiorari was filed on January 10, 1967, and briefs in opposition in early February.

On December 5, 1966, this Court noted probable jurisdiction in three cases[1] involving principally the applicability of the principles stated in *Reynolds* to units of local government. Three-judge courts were convened in each of these cases, and direct appeals were taken to this court. Subsequently, on January 9, 1967, the Court set a similar case[2] for argument with the other three cases, postponing a determination as to jurisdiction to the hearing on the merits, and directing the parties to brief and argue the question of whether a three-judge court should have been convened. A three-judge court was not convened in that case, and the apeal was from a decision of the Fourth Circuit.

It is the intention of the United States to file an *amicus* brief in all four of these cases. Jurisdictional problems aside, the government will support appellants in Nos. 430 and 624, and appellees in Nos. 491 and 724. The interest of the United States in these cases is that of millions of American citizens who are presently denied, through malapportionment at the local level, full and effective participation in the processes of the various units of local government. It is the position of the United

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[1] *Sailors* v. *Board of Education of Kent County*, No. 430; *Board of Supervisors of Suffolk County* v. *Bianchi*, No. 491; and *Moody* v. *Flowers*, No. 624, all this Term.

[2] *Dusch* v. *Davis*, No. 724, this Term.

States that, as a matter of constitutional principle, logic and sound policy, the principles of *Reynolds* apply to local governmental bodies whose members are elected from districts and require that those districts be substantially equal in population.

We assume that the instant case, involving issues basically similar to those involved in the four cases soon to be argued (and, more specifically, similar to those in Nos. 491 and 624 which, like this case, involve county governing boards), would in normal course be held by the Court pending argument and decision in the other cases. In the course of preparing our brief in the latter cases, however, it has come to our attention that serious jurisdictional problems may exist with respect to two of the four cases set for argument, and specifically as to Nos. 491 and 624, both of which are most closely related to the instant case. It is in light of this consideration that this memorandum is filed, although we intend to discuss the jurisdictional question more fully in our brief.

In our view it is quite doubtful that three-judge statutory courts were properly convened in Nos. 491 and 624. This Court has consistently construed 28 U.S.C. 2281 as authorizing the convening of a three-judge court only when a State statute of general, statewide application is challenged and sought to be enjoined. *E.g., Rorick* v. *Board of Commissioners of Everglades Drainage District,* 307 U.S. 208, 212–213; *Phillips* v. *United States,* 312 U.S. 246, 248–254; *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 227–228. Under these and like precedents, where only a local ordinance or a

State statute of limited application is sought to be enjoined, convening of a three-judge court is improper. In No. 491, the constitutional attack was directed toward the Suffolk County Charter.[3] Somewhat inexplicably, the three-judge court in that case discussed the jurisdictional question, but never articulated its resolution thereof, simply continuing to sit as a statutory court (see 238 F. Supp. 997, 999, 1001–1004). In No. 624, a State statute[4] prescribed the scheme for electing members of the county board, and State officials were named as defendants. Nevertheless, the statute at issue related solely to Houston County, Alabama, and could not therefore be properly viewed as a statute having statewide application.

Conversely, in No. 430 a three-judge court was properly convened, in our view, since the statute at issue was one relating generally to all Michigan county school boards of a certain type, and thus was a statute of general and statewide application. In No. 724, a single district judge properly heard and determined the case, in our view, since only a city charter provision (enacted as a State statute of limited appli-

[3] Sections 201 and 203 of the Suffolk County Charter, Laws of New York, 1958, Ch. 278, which are set out in Appendix F of the Jurisdictional Statement in No. 491, pp. 51a–52a. Although the county charter was enacted into law by the State legislature, such enactment could hardly be properly regarded as a State statute of general application.

[4] Acts of Alabama, Reg. Sess., 1957, No. 9, p. 30, which is set out in Appendix C of the Jurisdictional Statement in No. 624, pp. 30–36. The litigation below also involved the apportionment of another Alabama county, under a similar statute of limited application (see 256 F. Supp. 195, 198).

cation) was involved,[5] and appeal to the court of appeals was proper. In similar circumstances, a number of lower federal courts have concluded, in other cases challenging malapportionment at the local level, that three-judge courts should not be convened. See, *e.g.*, *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.), affirmed, 352 F. 2d 123, 124, n. 1 (C.A. 4); *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30, 31 (W.D. Pa.); *Strickland* v. *Burns*, 256 F. Supp. 824, 825, n. 1 (M.D. Tenn.); *Johnson v. Genessee County, Michigan*, 232 F. Supp. 563, 564–566 (E.D. Mich.); *McMillan* v. *Wagner*, 239 F. Supp. 32, 33–34 (S.D.N.Y.).[6]

If we are correct in perceiving jurisdictional problems in Nos. 491 and 624, the Court might not be able to reach the merits in those cases, since jurisdiction upon direct appeal under 28 U.S.C. 1253 exists only if the case was one "required" to be heard by three judges. We assume that the Court undertook to review a number of these cases together so as to have before it a variety of situations involving different sorts of local governmental bodies. Should the Court be unable to reach the merits in Nos. 491 and 624, there would no longer be before it for decision upon plenary consideration a case involving a

[5] See Circuit Judge Bryan's opinion in support of the dissolution of the three-judge court initially convened in No. 724, which is set out in the Appendix to the Jurisdictional Statement in that case (App. 25–28).

[6] Compare, however, *Simon* v. *Lafayette Parish Police Jury*, 226 F. Supp. 301, reversed and remanded for convening of a three-judge court *sub. nom. Simon* v. *Landry*, 359 F. 2d 67 (C.A. 5), certiorari denied, 385 U.S. 838.

county governing board—one of the most basic and common units of local government and the body as to which much of the lower federal and State court litigation on the constitutional issues has related. This, in our view, would be unfortunate.[7]

In light of these considerations, we suggest that the Court may wish to grant certiorari in the instant case and set it for argument along with the other cases.[8] Should it then be determined, after oral argument, that jurisdiction is lacking on direct appeal in Nos. 491 and 624, the Court would still have before it for decision on the merits one case involving a county governing board.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1967.

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[7] Both Nos. 430 and 724, the cases as to which this Court's jurisdiction on appeal seems clearly proper, involve somewhat unique and specialized questions, because of the nature of the process pursuant to which the county school board is elected in No. 430 and since an at-large election of the city council in No. 724 is provided for, but with seven of the eleven councilmen being required to reside in districts grossly disproportionate in population. Although the government will contend that the *Reynolds* principles should nevertheless be found applicable to these situations, because of these features neither No. 430 nor No. 724 presents the most appropriate vehicle, in our view, for a broad-based consideration and determination of the important constitutional questions involved.

[8] It appears that this Court's certiorari jurisdiction is properly invoked under 28 U.S.C. 1257(3) in the instant case. Should the Court grant certiorari in the instant case, the government intends to participate as *amicus* in that case as well.

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